(12)

No. 02-479

Supreme Court, U.S.
FILED
FEB 19 2003
CLERK

In the

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,
Petitioner,

v.

MICHAEL J. HASON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF FORMER SENATOR DOLE, SENATORS KENNEDY AND HARKIN, AND REPRESENTATIVE HOYER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[*]

Amici, Senators Robert Dole, Tom Harkin and Edward Kennedy, and Representative Steny Hoyer, are current and former Members of Congress who played leadership roles in the development and passage of the Americans with Disabilities Act (ADA) from 1988 to 1990. Relevant biographical information regarding each of the *amici* is provided in the Appendix. As key authors of the ADA, *amici* have an interest in the continuing vitality of the ADA as a vehicle to bring long-excluded citizens with disabilities into the mainstream of American life.

INTRODUCTION

The Americans with Disabilities Act has begun the process of transforming the American landscape and prevalent negative stereotypes about people with disabilities by promoting the integration of persons with disabilities into all aspects of public life. By directly addressing the State and local levels at which Americans commonly interact with their government, Title II of the ADA sought to redress exclusionary policies identified by Congress that were all the more invidious for their apparent self-justification: the less people with disabilities were seen, the more they could be assumed to be both unable and unwilling to fully participate in society.

The falseness of this twin burden of inability and disinterest cast upon people with disabilities has become self-evident in the years since the ADA has come into effect. The

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, or their counsel, made a monetary contribution to the preparation and submission of this brief.

law's successes in increasing the accessibility of public transportation, courtrooms, city halls, voting, higher education and professional licensing policies has begun to remedy years of state-sponsored segregation and exclusion. By allowing people with disabilities to be seen and accepted as participating members of our society, the Act has dispelled prevailing myths, fears and prejudices concerning people with disabilities. The extensive study and the careful balancing of interests engaged in by Congress to develop a proportionate remedy to combat this historic discrimination is demonstrated by the implementation of the Act since its passage. While change is often gradual and there is still much left to be done, persons with disabilities are, for the first time, beginning to enjoy their rights as citizens.

The hard-fought gains recently achieved by the passage and enforcement of the ADA, and the promise of greater equality and opportunity in the years to come, are threatened by the States' ongoing and broad-based challenges to the constitutional validity of the Act. While this case questions Congress' authority to enact the ADA under Section 5 of the Fourteenth Amendment, other state-sponsored cases challenge the Commerce Clause and the Spending Clause as authority for federal disability rights legislation. The ADA is the culmination of over twenty years of fact finding, study, and incremental legislation to address the wide-spread exclusion and segregation of Americans with disabilities.[1] If the Court does not take this opportunity to uphold Title II of the ADA under Section 5, federal disability laws that are just beginning to enable disabled persons to participate in critical facets of American life will be undermined before the goal of full integration has been achieved.

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[1] Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 *Temp. L. Rev.* 387, 387-391 (1991).

I. TITLE II OF THE ADA IS BEGINNING TO REVERSE HISTORIC EXCLUSION AND SEGREGATION BY INTEGRATING PERSONS WITH DISABILITIES INTO THE FUNDAMENTAL ACTIVITIES OF PUBLIC LIFE.

Title II is critical to people with disabilities attempting to exercise such fundamental rights of citizenship as access to the courts, service with their peers on juries, the right to vote, the ability to enter and communicate in the halls of city council, and the ability to receive state services in the community, free of institutional segregation.[2]

While the ADA has been an invaluable stimulus for state self-examination, voluntary compliance and collaboration with the disability community, individuals with disabilities must have the right to file complaints and bring lawsuits seeking injunctive relief and damages. As with all civil rights laws, those protected by the law are the front-line agents to ensure implementation. Without the right to

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[2] While the bar of the Eleventh Amendment does not apply to local government agencies, there is no bright line test to determine whether a public entity will be considered an "arm of the state" for immunity purposes. Rather, courts must undergo a fact-specific, multi-factor inquiry based in large part on state law, funding, and structure. For example, county courts may or may not be immune under the Eleventh Amendment. *Compare Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001) (county court is not an arm of the state) with *Alkire v. Irving* 305 F.3d 456, 467 (6th Cir. 2002) (county court is arm of state) and *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 811 (6th Cir. 2002) (court assumes state immunity would apply), *cert. denied* 123 St. Ct. 72 (2002). Likewise, transit authorities have and have not been considered arms of the state for Eleventh Amendment purposes. *Compare Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 224-25 (D.C. Cir. 1986) (transit authority entitled to Eleventh Amendment immunity) with *Feary v. Regional Transit Auth.*, 685 F. Supp. 137, 142 (E.D. La. 1988) (transit authority not arm of state).

damages, people with disabilities will have little incentive to bear the financial and personal burdens of initiating change when they are already subject to higher rates of unemployment, poverty and social stigma.

A. Voting Accessibility

The ability to vote is something most Americans take for granted and associate with membership in a democratic society. The fact that this basic right is still inaccessible to many individuals with disabilities demonstrates the extreme degree to which the needs of disabled citizens have been ignored by state election officials.[3] During the 1998 Congressional elections, approximately 20,000 polling places were inaccessible to wheelchair users.[4] Of those voters with disabilities who could reach the polling area, fifty-two percent found that the area lacked a designated, appropriately sized voting booth for them to cast their vote.[5] Seventy-three percent of the polling places in the major urban center of Philadelphia were physically inaccessible to voters with disabilities.[6] Eighty-one percent of voters who are blind or

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[3] In addition to accessibility issues discussed, *infra*, forty-two states totally disenfranchise citizens with mental disabilities in a variety of contexts. *See* Kay Schriner, *et al.*, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Emp. & Lab. L. 437, 456 tbl. 2 (2000); *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001).

[4] National Council on Disability, *Inclusive Federal Election Reform* (March 15, 2001), at http://www.ncd.gov/newsroom/publications/pdf/electionreform.pdf; Coalition for Accessible Political Elections (CAPE), *Report of the National Voter Independence Project* (last visited Feb. 16, 2003), at http://www.protectionandadvocacy.com/nationv.htm.

[5] *Report of the National Voter Independence Project*, *supra*, note 4.

[6] *Inclusive Federal Election Reform*, *supra*, note 4.

visually impaired had to rely on others to mark their ballots for them.[7] Perhaps most disturbing, more than ten years after the ADA was enacted, accessibility is often not even considered a factor in choosing polling sites.[8]

As with other areas where exclusion and segregation of people with disabilities has resulted in inaccessible public services, Title II provides an important vehicle to promote access and awareness.[9] Cases brought under the ADA are challenging inaccessible polling places, and are resulting in greater awareness by state and local voting officials. For example, the disability community in Texas filed lawsuits which resulted in cooperative efforts with election officials. Counsel for plaintiffs, James Harrington, writes that "[t]o their credit, each County showed great willingness to participate in significant negotiations. Local officials were keen on making their voting systems usable by people who are blind. This spirit of negotiation produced great

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[7] *Id.*

[8] The Center for an Accessible Society, 8 out of 10 Polling Sites have Access Barriers, Says GAO Report (2001), at http://www.accessiblesociety.org/topics/voting/gaovoterept1101.htm.

[9] Voting was plainly one of the concerns addressed in the Senate Report accompanying the Act and debated on the floor. *See* Senate Comm. On Labor and Human Resources, S. Rep. No. 101-116, 101st Cong. 1st Sess. (1989) at 12 (1989) (quoting Attorney General of Illinois, who stated that "[y]ou cannot exercise one of your most basic rights as an American if the polling places are not accessible."). *See also* 135 Cong. Rec. S10753 (1989) (remarks of Sen. Gore: "As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens.").

creativity."[10] And, eventually, awareness of the needs of voters with disabilities became a statewide concern. As reported by Harrington, "successive Secretaries of State . . . now facilitate and actively encourage access to the secret ballot for people with disabilities." [11]

These types of lawsuits have shown that solutions are possible, and have been used by other groups to bring suits under the ADA.[12] Because of the ADA, there have also been innovations in technology which foresee a future where the gross inequality in voting access will be a thing of the past. [13]

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[10] James C. Harrington, "Pencils Within Reach and A Walkman or Two: Making the Secret Ballot Available to Voters Who are Blind or Have Other Physical Disabilities," 4 *Tex. F. on C.L. & C.R.* 87, 94-95 (1999).

[11] *Id.* at 105.

[12] For example, a coalition of groups including the Eastern Paralyzed Veterans Association and the Blinded Veterans of America began class-action lawsuits against the cities of Washington, D.C. and Philadelphia, Pennsylvania, using examples like Harris County, Texas, the nation's third largest county, which has put accessible voting systems in place. American Association of People with Disabilities, *New GAO Report Shows Disabled are Denied Voting Access* (2001), at http://www.aapd.com/docs/Gao101601.html.

[13] The Federal Election Commission estimates that 20,000 of the country's 27,000 polling sites do not meet ADA requirements. New technology is being developed and tested to achieve compliance. For example, emerging technology allows a visually impaired voter to have the ballot read to him or her, and a hearing impaired voter to utilize a hearing aid compatible headset. John M. Williams, *Making Access to the Ballot Box a Snap for Disabled Voters* (1999), at http://www.businessweek.com/bwdaily/dnflash/sep1999/nf90915c.htm.

B. Community Integration

Perhaps the most basic, yet profound impact of the ADA is the gradual reversal of a shameful history of unnecessary segregation of people with disabilities in large, state-operated institutions. This Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), has spawned a national examination of the extreme harm caused by institutionalization. As this Court stated in *Olmstead*, 527 U.S. at 601, "[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment." Accordingly, the court found that under Title II of the ADA, states are required to provide community-based services when it is professionally advisable to do so and when the disabled individual so chooses. *Id.* at 607.

In response to *Olmstead* the Health Care Financing Administration (HCFA)[14] and the Department of Health and Human Services' Office of Civil Rights issued a set of recommendations to state Medicaid directors, outlining principles for states to consider when developing their *Olmstead* plans.[15] While change has been slow, states are beginning to explore community-based options for service.

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14 HCFA was the federal agency responsible for administering Medicaid. It is now known as the Centers for Medicare and Medicaid Services.

15 Letter from Timothy M. Westmoreland, Director of Center for Medicaid and State Operations at the Health Care Financing Administration & Thomas Perez, Director of the Office for Civil Rights at the Department of Health and Human Services to State Medicaid Directors (January 14, 2000), at http://www.cms.hhs.gov/states/letters/smd1140a.asp.

As of December 2001, 40 states, along with the District of Columbia, had commissions or task forces working to improve their state's management of long-term care.[16] However, as of May 2002, only 14 states had developed *Olmstead* plans.[17] Significantly, California has failed to do so.[18] Unfortunately, the need for the federal mandate is as urgent today as it was in 1990.[19] It is critical to the essential goals of the ADA that the states continue their efforts, and doubtful that they would do so without a federal mandate.[20]

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16 Wendy Fox-Grage et al., *The States' Response to the* Olmstead *Decision: A Work in Progress* (2002), at http://www.ncsl.org/programs/health/forum/olmsreport.htm.

17 Alexandra Stewart *et al., Implementing Community Integration: A review of State* Olmstead *Plans* 4 (2002), at http://www.chcs.org/publications/consumer.html.

18 Nancy Weaver Teichert, *State Urged to Provide Home Care for Disabled*, Sacramento Bee, June 22, 2002, at A1.

19 In 1997 there were still thousands of people nationwide who had been recommended for community placement but were waiting in institutions because of the lack of community options. Sharon Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), at http://www.thearc.org/misc/WaitPage.html.

20 For example, as the Ohio plan states, "[s]tate policy makers must continue to be responsive to the Health Care Financing Administration and the federal Office of Civil Rights to assure Ohio's compliance with the mandates of the Americans with Disabilities Act[.]" Thomas W. Johnson et al., *Ohio Access for People with Disabilities, Final Report to Governor Taft* 3 (2001), at http://www.state.oh.us/age/ohioaccessrpt.pdf. The Introduction to the Missouri plan states that its Home and Community-Based Services and Consumer-Directed Care Commission was established "[t]o address the implications of the Olmstead decision" and that "[t]he objective of the Commission was to develop a 'comprehensive, effectively, working plan' as recommended by the U.S. Supreme Court Olmstead decision." Home and Community-Based

C. Accessibility of the Justice System

Equal participation in the justice system, whether as a party, witness, juror or advocate, is integral to the American way of life. Yet disability discrimination has been present in all aspects of the court system, from jury selection procedures that eliminate people with disabilities to the lack of sign and other interpreters for parties and witnesses to the outright lack of physical access.[21] State, territorial and municipal court systems are encompassed within the non-discrimination provisions of Title II, and are therefore required to make all court proceedings, programs and activities accessible to people with disabilities by removing architectural, communication and transportation barriers.[22]

Services and Consumer-Directed Care Commission, *Working Plan of the Home and Community-Based Services and Consumer-Directed Care Commission*, at http://www.dolir.state.mo.us/gcd/olmstead/olmreport/coverpage.htm. Similarly, "*Olmstead*" lawsuits have also resulted in the increased availability of community options. *See e.g. Barthelemy v. Louisiana Dept. of Health & Hosp.*, 2001 U.S. Dist. LEXIS 17231 (E.D. La. 2001); *Rolland v. Cellucci*, 191 F.R.D. 3 (D.Mass. 2000); *Rolland v. Cellucci*, 198 F. Supp. 2d 25 (D.Mass. 2002); Gary A. Smith, *Status Report: Litigation Concerning Medical Services for Persons with Developmental Disabilities* 15-18 (2002), at http://www.qualitymall.org/download/litigation..pdf.

21 American Bar Association & the National Judicial College, *Court-Related Needs of the Elderly and Persons with Disabilities, Recommendations of the February 1991 Conference* (1991). *See also* Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 Judicature 39 (1992); Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & Health 123 (1994).

22 42 U.S.C. §§ 12131-12134; *see also* 28 C.F.R. § 35.130.

The actual accommodations required in any given case can be as simple as moving a juror with visual impairments closer to the witness box, providing enlarged print versions of tape transcripts used at trial, and reading documents into the record.[23] People with disabilities often are refused access to the courts not because they need complicated or expensive accommodations, but because they encounter exclusionary policies and attitudes that have never been critically examined.[24] The ADA requires that critical self-examination take place.[25]

The ADA's initiation of self-examination is an important part of its effectiveness in starting necessary systemic change in state judicial systems. For example, in

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[23] *People v. Caldwell*, 603 N.Y.S.2d 713, 714 (N.Y. Crim. Ct. 1993).

[24] For example, the District of Columbia Superior Court categorically excluded blind persons from jury service. *Galloway v. Superior Court*, 816 F.Supp. 12 (D.D.C. 1993). Santa Clara County Superior Court refused to provide auxiliary aids and services for persons with hearing impairments. DOJ, "Settlement Agreement Between the U.S. and the Santa Clara County Superior Court" at http://www.usdoj.gov/crt/ada/santacl.htm (last visited Feb. 16, 2003).

[25] Courts subject to the ADA were required to perform, within one year of the law's effective date, a self-assessment of all current services, policies and practices, and their effects. 28 C.F.R. § 35.105(a) (1993). *See also Gould*, *supra* note 21 at 148-150. According to a 1994 study conducted by David Pfeiffer and Joan Finn, based on questionnaires sent to local governments around the country as well as state and territorial governments, 85 percent of state and territorial government had conducted accessibility surveys of their court houses, and 93 percent of municipal courthouses had conducted accessibility surveys. Pfeiffer and Finn posit that "it is not possible to say that these finding are due solely to the ADA, but certainly the ADA would appear to be a significant factor: David Pfeiffer & Joan Finn, *Survey Shows State, Territorial, Local Public Officials Implementing ADA*, 19 Mental & Physical Disability L.Rep. 537-539 (1995).

1995, the California Judicial Council's[26] Subcommittee on Access for People with Disabilities[27] began "implementing the Act [ADA] in California's courts by sponsoring comprehensive research projects and adopting a series of recommendations to increase court accessibility to persons with disabilities."[28] The results of one of these surveys on "the attitudes and opinions of court personnel and people with disabilities who use the California courts indicated that numerous problems persist. A majority of the respondents (52 percent) said that they had not received requested accommodations, and nearly half (42 percent) concluded that courts do not meet ADA standards."[29] These results clearly indicate that much work remains to be done, but just as important is the fact that findings were made and published, and ultimately led to the Judicial Council's adoption of Rule of Court 989.3, which is meant to "assure that qualified

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[26] The California Judicial Council is a body that "under the leadership of the Chief Justice, is responsible for improving the quality and advancing the consistent, independent, impartial, and accessible administration of justice." Cal. R. Ct. 1001(2); *see also* Cal. Civ. Proc. Code § 901 (West 1986).

[27] The Subcommittee on Access for People with Disabilities, which consists of judges, attorneys and members of the public with specific expertise or interest in this field, was created to advise the Judicial Council on implementation of the ADA in the California court system. Access for Persons with Disabilities Subcommittee, California Judicial Council's Advisory Comm. on Access and Fairness in the Courts, *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 1 (1997).

[28] Maryann Jones, *And Access For All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75, 75 (1997).

[29] American Bar Association Commission on Mental and Physical Disability Law (James Carr, Chair), *Disability Law and Policy: A Collective Vision* 50 (Chicago: American Bar Association, 1999).

individuals with disabilities have equal and full access to the judicial system."[30] The ADA's accessibility requirements were the explicit impetus for bringing California's court system that much closer to accessibility.

Self-examination is only one vehicle for increasing awareness and making necessary modifications to allow access. Recommendations need to be implemented and Title II empowers individuals with disabilities with the legal right to enforce change. For example, almost a decade after the enactment of the ADA, a county in West Virginia had done little to ameliorate numerous physical barriers in its courthouse. The result for Joseph Bragg, a Korean War veteran and wheelchair user, is typical, when there is not access. In his words:

> I had to go to court over some property I owned, and the courtroom is on the second floor. A deputy and another man had to carry me up two flights of stairs because the old courthouse has no elevator. I didn't even ask to be carried down at lunch. Afterwards, I really needed to get to the restroom. Once I was carried back down to the first floor, my son rushed me down the hall to the men's room, but I couldn't even get my wheelchair through the door. I was so mad that I filed my complaint with the Department of Justice.[31]

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30 Cal.Ct.R. 989.3(a).

31 "Summers County, West Virginia" at http://www.usdoj.gov/crt/ada/sumstor.htm (last update July 31, 2002). *See also* DOJ Press Release, "Justice Department to Meet with Summers County Officials As Part of Initiative to Ensure Civic Access for People with Disabilities" (July 24, 2002) at

The failure of courts to provide needed accommodations deprives parties with disabilities of basic due process. For example, individuals who are deaf are often denied appropriate aids that would allow them to understand and participate in judicial and administrative proceedings.[32]

Fundamental principals of equal protection are affronted when citizens are forced to crawl or be carried up court house stairs, attend all day hearings with no opportunity to go to the bathroom,[33] or participate in proceedings without being able to hear what is being said.[34] The ADA rightly serves as a national statement that Americans with disabilities deserve better.

D. Public Transportation

People with disabilities have historically been denied access to public life by the failure to make public transportation accessible. The accessibility of buildings as well as employment and education opportunities are meaningless when people with disabilities have no way to reliably and inexpensively reach their destinations. It is not

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http://www.usdoj.gov/crt/ada/sumstr.htm; *See also, Matthews v. Jefferson*, 29 F. Supp. 2d 525 (W.D.Ark. 1998) (Court scheduled three hearings in inaccessible courtroom for paraplegic who had to be carried and had no access to bathroom); *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998).

32 *See, e.g., Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 72 (2002); *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S.Ct. 72 (2002).

33 *See Lane v. Tennessee*, No. 98-6730, 2003 U.S. App. LEXIS 303 (6th Cir. Tenn. Jan. 10, 2003), at *6; *Matthews v. Jefferson*, 29 F. Supp. 2d at 528.

34 *Popovich*, 276 F.3d at 815-16.

possible to overstate the differences that Title II has made for people with disabilities who need to use public transportation. The comprehensiveness of the ADA mandate – cutting across all modes of transportation (from fixed-route buses[35] to light rail transit to cross-country trains[36]) – is critical to the law's success in actually changing how public transportation is provided across the nation. Prior to the ADA's enactment, "the provision of accessible transportation in the United States was always varied and uneven. Uniform accessible transportation did not exist until it was required by the passage of the Americans with Disabilities Act of 1990."[37]

The ADA's directive to public transit authorities, that vehicles leased or purchased after specified dates be "readily accessible to and usable by individuals with disabilities,"[38]

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35 "Fixed route buses" refer to vehicles that travel pre-arranged routes according to a set schedule and pick up/drop off members of the general public at marked stops. This can be contrasted with "paratransit," which generally refers to separate transit services that are intended specifically for use by people with disabilities, and provide origin-to-destination services (usually through prior reservation).

36 *See* 42 U.S.C. § 12141 (definition of "designated public transportation"); 42 U.S.C. § 12182(b)(2) (defining discrimination with regard to particular types of transportation). The ADA does not address modes of transportation that are covered under other laws (e.g., the Air Carrier Access Act of 1986, 49 U.S.C. § 41705, prohibits discrimination in air travel).

37 Rosalyn M. Simon, "Status of Transportation Accessibility in the United States: Impact of the Americans with Disabilities Act," in *Proceedings of Seminar L Held at the Planning and Transportation Research and Computation European Transport Forum*, Brunel University, England § 1.2 (Sept. 2-6, 1996).

38 42 U.S.C. § 12142(a)-(c) (collectively encompassing new, used and remanufactured vehicles).

initiated significant measurable changes in national transportation accessibility. As Rosalyn M. Simon notes:

> In 1989, one-third (36%) of the national bus fleet was accessible. Post-ADA fixed route bus accessibility increased to 39 percent in 1990, 46 percent in 1991, and 52 percent in 1992. Using data reported in transit system 1994 ADA plans, the federal government reported the national bus fleet as 55 percent accessible with 29,000 lift/ramp-equipped buses in 1994 and 60 percent accessible with 32,000 lift-ramp-equipped buses in 1995. Their projections indicate that by 2002, the national bus fleet will be 100 percent lift/ramp-equipped. In addition, by 2005, all fixed route buses will also be equipped with ADA-compliant communication systems . . . More than 100 public transit systems are now providing 100 percent accessible fixed route bus service during peak hours.[39]

These dramatic improvements in accessibility are directly attributable to Congress' establishment of broad national standards for public transportation accessibility. Without the ADA, the interstate mobility of people with disabilities would always be subject to substantive and technical differences in state accessibility requirements. The ADA transportation provisions represent many years of negotiation with transit authorities. The provisions are reasonable and gradual, based on the turnover of vehicles, a natural consequence of normal wear and tear and technical obsolescence; if turnover is no longer subject to accessibility requirements, public transportation fleets could return to their

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39 *Supra* note 37, at § 3.1.

previous inaccessible state as quickly as they became accessible.

E. Higher Education

The 1990 Americans with Disabilities Act has spurred increased enrollment of students with disabilities in institutions of higher education. The law's mandate that colleges and universities remove campus architectural barriers and provide accommodations such as readers for students with vision impairments and sign language interpreters for deaf students have enabled tens of thousands of people with disabilities to attain a post-secondary education and enter the nation's workforce.

As reported by Dr. I. King Jordan, the first deaf president of Gallaudet University:

> Certainly, life before the A.D.A. was rampant with physical and social barriers that prevented disabled people from making even rudimentary decisions. Many were trained in sheltered workshops, or warehoused by families and educational systems embarrassed by their very existence, and convinced they had little potential for success.
>
> Being deaf, I at least had the opportunity for a fine, accessible undergraduate education at Gallaudet and the chance to go on for graduate degrees. However, when I entered the University of Tennessee's graduate program in psychology in 1969, I did so realizing that it would be a rough ride. I neither expected nor received any special accommodation. As a consequence, day after day I sat through classes understanding little if anything my

professors said. I depended on the good will of my classmates to share their notes with me, and I spent long nights in the library in order to keep up with my classes. It was both a grueling and lonely period, and most deaf students had similar experiences at the time. Had I been blind or a wheelchair user, it would have been considerably more of a challenge, as most campuses were not accessible to individuals with mobility disabilities. . . .

[I]t is now commonplace to find deaf and hard-of-hearing students – accompanied by sign-language interpreters or having access to real-time captioning – taking classes in universities throughout the country. Similarly, students in wheelchairs zipping across our campuses, or blind students reading Brailled texts and using specially equipped computers, have become familiar. They may continue to spend time in the library or compare notes with classmates, but it is not for the same reason that I did. Thanks to the A.D.A., many communications and other barriers have been removed, and disabled students are guaranteed the right to equal educational opportunity.[40]

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[40] Dr. I. King Jordan, "Colleges Can Do Even More for People With Disabilities," *The Chronicle of Higher Education*, Section 2 (June 15, 2001), at http://president.gallaudet.edu/chron.html.

The ADA has not eliminated discrimination in the hallways of higher education.[41] Aspiring students with disabilities still face physical, attitudinal and procedural barriers every day, but there can be no doubt that the ADA has brought in a new era in higher education, resulting in changed attitudes about and increased opportunities for people with disabilities.

F. Licensing

State governments regulate countless areas of employment through licensing programs.[42] Accordingly, it is unsurprising that the Department of Justice regulations on Title II expressly provide that a public entity "may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(6); *see also* § 35.130(b)(1) ("A public entity, in providing any aid, benefit, or service, may not, directly or

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[41] *See, e.g., Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (University refused to assign roommate to student who used a wheelchair and the services of a personal attendant).

[42] In California, for example, the state licenses virtually every profession and vocation. It should be noted that contrary to Petitioner's assertion that "California's own statutory prohibition against discrimination in licensure on the basis of disability antedated the ADA by eight years," *see* Petitioner's Brief, pp. 24-26, n.9, prior to the ADA California prohibited discrimination only on the basis of "physical handicap" and "medical condition," which was defined as having a prior cancer diagnosis. Persons with mental disabilities were not covered. It was only in 1992, after the passage of the ADA and prompted by it, that state law was amended to protect persons with mental as well as physical disabilities from discrimination. *See* Cal. Stats. 1992 ch. 913 (Assembly Bill 1077). *Compare* Cal. Gov. Code §§ 12926 & 12940 (1992) (available in LEXIS's 1991 legislative archive for California) with Cal. Gov. Code §§ 12926 & 12940 (1993) (available in LEXIS's 1992 legislative archive for California).

through . . . licensing, or other arrangements, on the basis of disability – . . . [d]eny a qualified individual with a disability the opportunity to participate . . .".) The ADA structure promotes fairness and safety by focusing upon *qualifications*: an unqualified or unsafe applicant need not be licensed. *Id.*[43] Further, a public entity cannot be compelled to make any fundamental alterations in its program. 28 C.F.R. § 35.164.

Historically, certification and licensing programs have functioned to unfairly exclude some individuals with disabilities from certain activities. For example, as Congress learned during the ADA hearings, teachers have been excluded from required certification on the basis of disability.[44] Many of these outright exclusions from licensing and certification have been remedied through the application of the Rehabilitation Act of 1973 and the

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[43] In this case, on remand, Dr. Hason will be required to demonstrate such qualifications and abilities; if he cannot, his suit is subject to dismissal on the merits.

[44] One witness recounted a series of discriminatory encounters by public entities, including the denial of a teaching credential because she was paralyzed as a result of childhood polio. Senate Comm. On Labor and Human Resources, S. Rep. No. 116, 101st Cong. 1st Sess., 7. In Philadelphia, prospective teachers with "chronic or acute physical defects," including blindness, were barred from taking the required examination. *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Penn. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977); *see also King-Smith v. Aaron*, 455 F.2d 378 (3d Cir. 1972) (blind applicant to teach in Pittsburgh public school system rejected from placement on eligibility list based on vision). In New York, a woman with spina bifida was denied her teaching license on the basis that she was physically "not fit." *Fiesel v. Board of Education of the City of New York*, 490 F. Supp. 363 (E.D. N.Y. 1980). Also in New York, a blind applicant was denied certification to teach junior high vocal music, as he was "not fit" due to "defective vision.". *Chavich v. Board of Examiners of the Board of Education of the City of New York*, 252 N.Y.S.2d 718 (N.Y. Spec. Term 1964).

Americans with Disabilities Act of 1990, permitting far greater opportunity for persons with disabilities.

Even where outright exclusions have not existed, discrimination has occurred through onerous and intrusive licensing procedures. In deciding whether an applicant or licensee is fit to practice, professional licensing boards frequently make extremely broad inquiries into the individual's psychiatric history, treatment, and diagnoses.[45] As many commentators have noted, these investigations are not always tailored to the central relevant question: whether the individual is able to safely and competently practice their chosen profession.[46] Frequently, those who have responded affirmatively to these questions have been forced to disclose additional, highly intimate psychiatric information and records, have endured additional procedural steps, including oral questioning before licensing boards, and have experienced significant delay in obtaining or renewing their

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[45] Thomas E. Hansen, M.D., *et al.*, "Changes in Questions About Psychiatric Illness Asked on Medical Licensure Applications Between 1993 and 1996," *Psychiatric Services*, vol. 49, no. 2 (Feb. 1998) (in 1993 and 1996, 75 and 80 percent of medical boards, respectively, used forms which contained inquiries about mental illness); *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430, 433 (E.D. Va. 1995) (as of 1995, 32 state had broad mental health inquiries for bar applicants, ten states and the District of Columbia asked about hospitalizations, and seven states included no mental health inquiries).

[46] *See, e.g.*, Jon Bauer, "The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and The Americans with Disabilities Act," 49 *U.C.L.A. Law Rev.* 93 (2001); Stanley S. Herr, "Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities," 42 *Vill. L. Rev.* 635 (1997); Phyllis Coleman and Ronald A. Shellow, "Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution," 20 *J. Legis.* 147 (1994). According to the American Psychiatric Association, the psychiatric history of an applicant is not an accurate predictor of fitness. *Clark*, 880 F. Supp. at 435.

license.[47] The public health implications are considerable: many students and professionals have been deterred from appropriate and preventive mental health treatment.[48] Again, the ADA has been instrumental in remedying these practices, by focusing upon actual qualifications and abilities, rather than generalizations and stereotypes about mental conditions.[49]

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47 Steven H. Miles, M.D., A Challenge to Licensing Boards: The Stigma of Mental Illness," *JAMA*, vol. 280, no. 10 (Sept. 9, 1998) (detailing demands of medical board for ongoing release of all psychiatric records after author with no record of incompetence disclosed bipolar diagnosis); Randy A. Sansone, M.D., *et al.*, "Physician Mental Health and Substance Abuse: What Are State Medical Licensure Applications Asking?," *Arch. Fam. Med.*, vol. 8 (Sept./Oct. 1999), pp. 448-49 (noting procedural hurdles and privacy concerns triggered by affirmative responses); Jon Bauer, *supra* at 101-125 (recounting negative and protracted experiences of several Connecticut applicants); Claudia Center, *et al.*, "Confronting Depression and Suicide in Physicians: A Consensus Statement" (American Foundation for Suicide Prevention, 2003), submitted to *JAMA* for publication (reviewing discrimination in medical licensing, hospital privileges, and insurance faced by physicians with psychiatric disorders).

48 *Clark*, 880 F. Supp. at 445-46 (citing plaintiff's "considerable evidence of the stigmatizing and inhibiting effect of broad mental health question[ ]" which "both amplifies the stigmatization of disabled persons and, at the same time, deters the counseling and treatment from which such persons could benefit," in issuing injunction); Steven H. Miles, M.D., *supra* (describing physicians who have avoided treatment); Sansone, M.D., *supra* at 449 (citing "realistic concern" that inquiries may cause physicians to avoid or postpone treatment); American Psychiatric Association, "Position Statement on Confidentiality of Medical Records," *Am. J. Psychiatry* vol. 141 (1984), pp. 331-32 (expressing concern that licensing board questions focusing on diagnosis or treatment deters physicians from seeking help).

49 *Clark*, 880 F. Supp. at 437 (unnecessary mental health question on a bar application violates the ADA's prohibition against discriminatory eligibility criteria); *Ellen S. v. Florida Board of Bar Examiners*, 859 F.

II. THE CONTRIBUTIONS OF THE ADA ARE THREATENED BY SOME STATES' ONGOING AND BROAD-BASED CONSTITUTIONAL CHALLENGES TO ITS VALIDITY.

The question now before this Court is whether Congress had the authority under Section 5 of the Fourteenth Amendment to enact Title II of the Americans with Disabilities Act, which permits individuals to seek money damages from the State to remedy disability discrimination. As this Court reviewed in *Garrett*, "Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting

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Supp. 1489, 1494 (S.D. Fla. 1994) (Florida's mental health questions "discriminate against Plaintiffs by subjecting them to additional burdens based on their disability."); *Medical Society of New Jersey v. Jacobs*, 1993 U.S. Dist. LEXIS 14294 (D. N.J. Oct. 5, 1993) (mental health questions imposed extra burdens on qualified persons with disabilities in violation of ADA); *In re Applications of Underwood and Plano*, 1993 Me. LEXIS 267, 3 Am. Disabilities Cas. (BNA) 573 (Me. Sup. Ct. Dec. 8, 1993) (requirement that applicants answer mental health questions discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities); *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn., complaint filed Feb. 1, 1994) (after complaint filed and several hearings, Connecticut bar voted to eliminate its broad question about outpatient treatment, and replace it with tailored question regarding impaired ability to practice law); Steven H. Miles, M.D., *supra* (after discrimination complaints were filed, the board agreed to make the relicensing questionnaire focused upon whether the physician is impaired in his or her ability to practice, and to narrow access to medical records); Hansen, M.D., *supra* (noting increased focus of application questions on impaired professional abilities rather than psychiatric condition alone, and concluding that the enforcement of the ADA appears to be encouraging revised questionnaires); *see also Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534 (S.D. Fla. 1995); *but see Applicants v. State Bd. Of Law Exam'rs*, 1994 U.S. Dist. LEXIS 21290, 4 Am. Disabilities Cas. (BNA) 165 (W.D. Tex. Oct. 11, 1994).

'appropriate legislation.'" *Bd. Of Trustees v. Garrett,* 531 U.S. 356, 365 (2001). This power "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. Of Regents,* 528 U.S. 62, 81 (2000); *City of Boerne v. Flores,* 521 U.S. 507, 536 (1997).

As this Court has reiterated, however, legislation which reaches beyond the scope of Section 1's actual guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Garrett,* 531 U.S. at 365 (citing *City of Boerne,* 521 U.S. at 520). Accordingly, in this case, the Respondent and his *amici* have demonstrated a long history and pattern of unconstitutional conduct in the administration of those very activities regulated by Title II – the "services, programs, [and] activities" of the State. As set forth in the briefs submitted, state conduct excluded and, too often, continues to exclude, disabled persons from public education, public transportation, voting, community services, and, quite literally, city hall. Congress took care to document the shameful legacy of state-sponsored discrimination in the voluminous legislative history of the ADA, and to craft the congruent and proportional response found in Title II of the Act.

While this case is limited to one relatively circumscribed, albeit critical, aspect of federal disability discrimination law – the availability of damages under Title II – this challenge to Congress' Section 5 authority is but one part of an ongoing challenge by some States to Title II.

States are also challenging Congress' power to enact all[50] or portions of Title II[51] under the Commerce Clause.

States attempt to minimize the effect of invalidating Title II under Section 5 by referring to parallel protections in

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[50] Challenges to injunctive relief under *Ex Parte Young* continue despite the fact that this Court has already resolved the question. *Garrett*, 531 U.S. at 32 n.9. *See, e.g.*, Defendant's Motion to Dismiss in *McCarthy v. Gilbert*, Civil Action No. 02-CV-600 (E.D. Tex., Beaumont Division) (arguing that *Ex Parte Young* cannot be used to enforce Title II of the ADA or its regulations because Title II exceeds the scope of Congress' power under Section 5 and the Commerce Clause); Brief of Appellees in *Meyers v. State of Texas*, Case No. 02-50452 (5th Cir.) (on appeal from the U. S. Dist. Ct, W.D. Tex., Austin Div.) ("Because it offends fundamental notions of federalism to permit *Young* suits based on statutes Congress lacked authority to enact under Section 5, the Court should hold that there is no Eleventh Amendment exception permitting prospective enforcement of federal laws – like Title II – under which Congress did not abrogate Eleventh Amendment and sovereign immunity."); *Williams v. Wasserman*, 164 F. Supp.2d 591, 598 n.10 (D. Md. 2001).

[51] Several states, including Connecticut, Pennsylvania, North Carolina, Maryland, and Virginia, have argued that Congress lacked Commerce Clause authority to regulate prisons under the ADA. See Petitioner's Brief in *Pennsylvania v. Yeskey*, 1997 U.S. Briefs 634 (LEXIS) (March 4, 1998) ("[n]either the Commerce Clause nor the Fourteenth Amendment gives Congress the power to regulate the management of state prisoners"); *Saunders v. Horn*, 959 F. Supp. 689 (E.D. Penn. 1997); *Pierce v. King*, 918 F. Supp. 932, 938 (E.D.N.C. 1996) (Congress lacked Commerce Clause authority, as prison labor does not substantially affect interstate commerce, citing *United States v. Lopez*, 514 U.S. 549 (1995)); *Staples v. Virginia Dept. of Corrections*, 904 F. Supp. 487, 490 (E.D. Va. 1995) (citing *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996); *Amos v. Maryland Dep't of Safety*, 178 F.2d 212 (4th Cir. 1999), *vacated for rehearing en banc, subsequently dismissed pursuant to settlement*, 205 F.3d 687 (4th Cir. 2000); *Hicks v. Armstrong*, 116 F. Supp.2d 287 (D. Conn. 1999).

504.[52] However, states continue to challenge applications of the Rehabilitation Act of 1973 as unauthorized by the Spending Clause. The states argue that they have not waived their sovereign immunity by accepting federal funds, an argument which has been correctly rejected by most federal appellate courts.[53] More significantly, the states continue to argue that the requirements of the Rehabilitation Act are not "reasonably related" to the purposes of the federal funds disbursed, and that so conditioning the funds is unconstitutionally coercive, an argument that has also been rejected.[54]

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[52] *See, e.g.* Brief for Petitioners in *Garrett* (June 22, 2000), 1999 U.S. Briefs 1240 (LEXIS) at * 38 (noting availability of "comparable injunctive and monetary remedies of the Rehabilitation Act").

[53] *See, e.g., Koslow v. Pennsylvania Dep't of Corrections*, 302 F.3d 161 (3d Cir. 2002); *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002) (Section 504 and Title VI); *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812 (9th Cir. 2002), *rehearing en banc denied*, 285 F.3d 1226 (9th Cir. 2002); *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626 (6th Cir. 2001); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 121 S.Ct. 2591 (2001); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval*, 532 U.S. 275 (2001). *Cf. Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999) (both Title IX cases). *But see Garcia v. SUNY Health Sciences Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001).

[54] *See, e.g., Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), *cert. denied*, 2003 WL 95557 (Jan. 13, 2003); *Koslow v. Pennsylvania Dep't of Corrections*, 302 F.3d 161, 175-76 (3d Cir. 2002); *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc) (rejecting state's argument that Rehabilitation Act requirements upon federal funding were unduly coercive), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 121 S.Ct. 2591 (2001). However, in *Jim C.*, the dissenting four judges used the test enunciated by this Court in *South*

CONCLUSION

Continued challenges by some States to the newly established rights of disabled Americans disregard the pervasive history of discrimination faced by people with disabilities and the studied, gradual and reasonable approach taken by Congress in fashioning an appropriate remedy. These long awaited rights are well within Congress' authority to enforce the Fourteenth Amendment as set forth by this Court in *Garrett*.

In enacting the ADA, Congress invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). As demonstrated in the briefs filed by respondent and his *amici*, Congress developed a record of pervasive state-sponsored discrimination and designed a proportionate response based on principles of reasonableness and qualifications.

The promise of the ADA is just beginning to be realized. States are making the basic vestiges of citizenship available to persons with disabilities for the first time in history. This progress is in keeping with the most fundamental principles of equality embodied in the Fourteenth Amendment. There can be no doubt that the invalidation of Congress' long and deliberative process in recognizing and remedying "the continuing existence of unfair and unnecessary discrimination and prejudice"[55] toward people with disabilities will impede continuing

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Dakota v. Dole, 483 U.S. 203 (1987) as the basis for opining that Congress lacked authority under the Spending Clause to enact Section 504. 235 F.3d at 1082-85 (8th Cir. 2000) (en banc).

[55] 42 USC § 12101 (9).

progress toward a nation where people with disabilities can participate fully in civic life.

When President George H.W. Bush signed the Americans with Disability Act he stated:

> And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.
>
> And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.

While progress has been great, the ADA is still an indispensable tool to put equal citizenship firmly within the grasp of Americans with disabilities.

Respectfully submitted,

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APPENDIX

BIOGRAPHIES OF *AMICI CURIAE*

Former Senator Robert Dole served as the Republican Senator from Kansas from 1969 to 1996. During that time, he served as the Majority and Minority Leader in the Senate and was an original co-sponsor of the ADA. Senate Dole was a leader in the negotiations that led to the passage of the ADA.

Senator Tom Harkin is the Democratic Senator from Iowa, and has served in the Senate since 1985. Senator Harkin was the chief sponsor of the ADA in the Senate, and chair of the former Disability Policy Subcommittee of the Senate Labor and Human Resources Committee. In these roles, Senator Harkin was a leader in the negotiations that resulted in the ADA's passage.

Senator Edward Kennedy is the senior Democratic Senator from Massachusetts and has served in the Senate since 1963. From 1987 to 1994, Senator Kennedy chaired the Senate Labor and Human Resources Committee. In 1989, Senator Kennedy, together with Senator Tom Harkin and 32 other Senators introduced the second version of the ADA. Senator Kennedy played a key role in the negotiations and compromises that resulted in passage of the ADA.

Congressman Steny Hoyer is the Democratic Representative from the 5th district of Maryland. Congressman Hoyer was chairman of the House Democratic Caucus from 1989 to 1994. From 1989 to 1990, Congressman Hoyer led the negotiations of the ADA on behalf of the Democratic House leadership as the bill passed through four House committees.